**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| **STATE OF OKLAHOMA, et al.,** | ) | |
| | ) | |
| **Plaintiffs** | ) | |
| | ) | |
| | ) | |
| **vs.** | ) | **Case No. 4:05-cv-00329-GKF-PJC** |
| | ) | |
| | ) | |
| **TYSON FOODS, INC., et al.** | ) | |
| | ) | |
| **Defendants** | ) | |

**DEFENDANTS' JOINT REPLY IN SUPPORT OF**
**DEFENDANTS' MOTION IN LIMINE TO EXCLUDE**
**ANY REFERENCE TO NEWSPAPER ADVERTISEMENTS [DKT. #2432]**

Defendants jointly offer the following as their Reply in support of their Motion *In Limine* Regarding any Reference To Newspaper Advertisements (Dkt # 2432) and in response to State of Oklahoma's Response To Defendants' Joint Motion *In Limine* Regarding Any Reference To Newspaper Advertisements (Dkt #2475).

**DISCUSSION**

The Attorney General of Oklahoma and several defendants in the current lawsuit engaged in private mediation before the filing of this lawsuit. Following said mediation, the Attorney General, as a representative of the people of Oklahoma, made public statements accusing the defendants of failing to negotiate in good faith. Plaintiffs allege that because the ads were placed after the failed mediation, that said ads should not be considered an attempt at settlement. (Pltf.'s Rspns. at 2). Though a lawsuit had not been

filed at the time of the ads, the State of Oklahoma had made it clear after the fruitless mediation that its intent was to file suit against various poultry industry companies with ties to the Illinois River Watershed ("IRW").

Federal Rule of Evidence 408 exists to protect two public policies which are identified in the Advisory Committee Notes. The Notes state, "exclusion [of evidence of settlement] may be based upon two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position….[and] (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes." Rule 408 Fed. R. Evid., Advisory Committee Note, 1972 Proposed Rules, 28 U.S.C.A. Rule 408 (West 2001).

In their response to Defendants' motion, Plaintiff asserts that Defendants' "public relations campaign" does not implicate Federal Rule of Evidence 408. (Pltf.'s Rspns. at 2). Specifically, Plaintiff claims that the advertisements were not settlement negotiations, but were public statements "designed to influence public opinion regarding the issues in this lawsuit." (Pltf.'s Rspns. at 3). Such is not the case. In response to the Attorney General's numerous public statements regarding Defendants' actions at the private mediation, Defendants placed ads in two Oklahoma newspapers which detailed proposals provided to the Attorney General. These proposals, if accepted by the Attorney General, would negate the need for the Attorney General to bring suit against the poultry industry companies.

Plaintiff further places too much emphasis on the word *voluntary* which is present in one of the two newspaper ads. Plaintiff states that Holmes v. Marriott Corp., 831 F. Supp. 691 (S.D. Iowa 1993) is applicable, asserting that an unconditional or voluntary offer was not an offer in compromise. Such an assertion fails. While it is true that Defendant's newspaper ads did not specifically state the Plaintiff's assertions made during settlement negotiations, the text of the ads noted that the poultry industry companies listed had been in contact with the Attorney General. For example, the Daily Oklahoman newspaper ad from September 10, 2004 clearly states "we have been working with the State of Oklahoma" in an effort to address the claims made before the lawsuit had been filed. The ad goes on to state that the proposal outlined in the ad had been delivered to the Attorney General. It is clear the ad placed in the Daily Oklahoman was an attempt to outline the proposal the Defendants had made to the Attorney General.

Furthermore, the December 5, 2004 ad placed in the Tulsa World contains a general description of nutrient condition in the Illinois River Watershed. The text of the ad makes no admissions of liability or the need for action. It does however state that "a good deal of concern has been raised about the effect of excess nutrients on the land and waters of Eastern Oklahoma." In response to the statement, which clearly alludes to the allegations by the Attorney General that would eventually lead to the filing of the current lawsuit months later, the ad states the Defendants "have recently proposed an extensive plan to address poultry related nutrient management." While it is true that the ad does not clearly state that the proposal by the Defendants was an attempt to avoid litigation,

the proposal was clearly made in response to governmental allegations of excess nutrients in the Illinois River Watershed.

Next, Plaintiffs assert that if the ads are not considered an attempt to compromise or conduct settlement in a compromise negotiation, then Defendants' relevance and Federal Rule of Evidence 403 argument must fail. (Pltf.'s Rspns. at 4). Such is not the case. Rule 403 states "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ". If the Court finds that the ads were not statements made in furtherance of settlement negotiations, said ads are still prejudicial and should be excluded. Nothing in either ad is an admission of liability on behalf of any Defendant. Both ads state that there have been allegations or "a good deal of concern" regarding excess nutrients in the IRW, and state that the poultry industry has proposed steps to improve the water quality of the IRW. However, nothing in the ads should be viewed as an admission that any alleged excess nutrients are the fault of the poultry industry.

In a mere footnote, Plaintiffs alleged that any prejudice to Cal-Maine, who was not a part of the placement of the ads, could be cured with a simple jury instruction. (Pltf.'s Rspns. at 5). Even before litigation began in this matter, Plaintiffs have made their allegations against the Defendants as a whole, and completely failed to delineate between which Defendants were responsible for specific harm and specific locations in the Illinois Watershed. For Plaintiff to now attempt to label the ads as admissions by all defendants, save for one defendant, would only confuse the jury. If the ads are admitted into evidence, any prospective juror would be forced to weigh alleged admissions by some

parties against the lack of an admission of the same acts by another. Common sense would dictate that when six defendants are being accused of the same harm, asking the jury to disregard the same evidence against one defendant would be impossible, and at the least, prejudicial and confusing.

Plaintiffs further attempt to pigeon hole Defendants' position stating that Western District Local Rule 16.2(i) is controlling. (Pltf.'s Rspns. at 3). Rule 16.2(i) specifically deals with communications conducted in settlement conferences, but, as Defendants stated in their Motion *in Limine*, the policy behind Rule 16.2(i) persuasive as it reinforces Rule 408's prohibition of the use of settlement statements in general to prove liability.

Because the ads in the Daily Oklahoman and Tulsa World were done in response to claims of excess nutrients, and merely inform the public of proposals sent by the Defendants to the Attorney General, as representative of the people of Oklahoma, said ads are clearly "statements made in compromise negotiations regarding the claim." Fed.R.Evid. 402(a)(2), and should be excluded at trial.

Finally, Plaintiffs assert that the ads are the Defendants' own statements, offered against the Defendants, and thus are not hearsay under Fed.R.Evid. 801(d)(2)(A). Plaintiffs further claim that the such statements "need not admit liability or otherwise concede liability or otherwise concede or confess an issue to fall within the scope of non-hearsay under Rule 801(d)(2)(A)." (Pltf.'s Rspns. at 5). Plaintiffs allege that "admissibility is grounded "on a kind of estoppel or waiver theory," that a party should be entitled to rely on his opponent's statements". (Pltf.'s Rspns. at 5). The statements made in the ads do not admit liability, however, if the ads are introduced into evidence,

the jury will likely see the Defendant's proposals as an admission of liability, further necessitating the application of Rule 408's exclusion of settlement negotiations.

## CONCLUSION

For the Foregoing reason, Defendant's Joint Motion *in Limine* Regarding Any Reference to Newspaper Advertisements (Dkt. #2432) should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 4th day of September 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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